

**AGREEMENT FOR SERVICES FOR THE BUSINESS INCUBATOR AND
ACCELERATOR**

**CITY OF FLAGSTAFF
and
NORTHERN ARIZONA TECHNOLOGY & BUSINESS INCUBATOR, INC., DBA
NACET**

Agreement made by and between the City of Flagstaff (the "City"), a municipal corporation with offices at 211 W. Aspen Avenue, Flagstaff, Coconino County, Arizona, and Northern Arizona Technology & Business Incubator, Inc., dba NACET (the "Provider"), an Arizona corporation, with offices at 2225 North Gemini Drive, Flagstaff, Arizona, 86001 effective as of the date written below.

RECITALS

- A. The City is the Landlord, and NACET is the Provider under the Business Incubator Master Lease Agreement and the Business Accelerator Master Lease Agreement executed contemporaneously herewith.
- B. The previous Agreement for Services for the Business Incubator between the parties, and Amendments thereto, are hereby terminated, null and void, as they are superseded and replaced by this Agreement for Services for the Business Incubator and Accelerator; and
- C. The City desires to enter into a contract with Provider for purposes of using Provider's expertise to provide incubator and accelerator services for the City; and
- D. Provider has available and offers to provide personnel necessary to accomplish services in accordance with the Services set forth in **Section 2** of this Agreement;

For the reasons recited above, and in consideration of the mutual covenants contained in this Agreement, the City and Provider agree **as follows**:

1. TERM

- 1.1. Term. The term of this Agreement (the "Term") shall be three (3) years and shall commence on _____, 2015 (the "Commencement Date"), and shall expire on _____, 2017 (the "Termination Date"), unless the Term is extended as hereinafter provided. Both parties shall have the right to extend this Agreement for one or more of the Extension Terms pursuant to Section 1.2 of this Agreement.
- 1.2. Options to Extend Term. Subject to the satisfaction of the conditions hereinafter set forth, the parties shall have the right to elect to extend the Term of this Agreement for up to three (3) consecutive five (5) year extension terms (each, an "Extension Term"). The conditions precedent to elect to extend the Term of this Agreement for any one or more of such Extension Terms are as follows:

1.2.1. Provider shall not then be in default under this Agreement;

1.2.2. Provider shall provide written notice to Landlord of its desire to elect to extend the Term of this Agreement not later than one hundred eighty (180) days prior to the end of the initial Term or the then current Extension Term, as applicable;

All terms and conditions of this Agreement shall remain in full force and effect and shall define the legal relationship between Landlord and Provider during each Extension Term.

1.3. Mutual Cancellation/Termination. The parties may cancel and terminate this Agreement upon mutual consent. In the event the parties desire to mutually cancel/terminate this agreement, a date of cancellation/termination shall be mutually agreed upon by the parties. If a mutual termination occurs, each party shall be entitled to, and obligated under this agreement on a pro-rated basis up to and including the date of cancelation/termination.

2. RIGHTS AND OBLIGATIONS OF PROVIDER

2.1. Independent Contractor. The parties agree that the Provider performs specialized services and that Provider enters this Agreement with the City as an independent contractor. Nothing in this Agreement shall be construed to constitute the Provider or any of Provider's agents or employees as the agent, employee or representative of the City. As an independent contractor, Provider is solely responsible for all labor and expenses in connection with this Agreement and for any and all damages arising out of this Agreement caused by Provider and subject to the indemnification provision set forth in **Section 5**.

2.2. Provider's Control of Services. All services to be provided by Provider will be performed at Provider's place of business or as otherwise determined by Provider. Provider will furnish the qualified personnel, materials, equipment and other items necessary to carry out the terms of this Agreement. Provider will be responsible for and in full control of the services of all such personnel.

2.3. Reports, Budgets and Plans to the City. Although the Provider is responsible for control and supervision of services performed under this Agreement, the services provided must be acceptable to the City and will be subject to a general right of inspection and supervision to ensure satisfactory completion. This right of inspection and supervision may include periodic activity reports provided by Provider to the City Council. The City shall have the right to audit Provider's records related to the performance of this Agreement. The City and Provider agree to define the scope of Provider's periodic activity report, including measures to protect or eliminate confidential material. In addition, Provider will prepare and provide to the City during the term of this Agreement annual budgets, not including other income streams, and a business plan.

- 2.4. Provider's Performance Criteria. Evaluation of Provider will be based on Provider's successful completion of its annual business plan and Provider's compliance with EDA grant criteria. For guidance purposes only, reference may be made to selected pages of the application and Agreement for the U.S. Department of Commerce, Economic Development Administration Grant for Public Works and Facilities for the Northern Arizona Technology & Business Incubator and Business Accelerator. Upon request, the City will provide a full and complete copy of the Grant application and Agreement to Provider, and the City's authorized representative will work with Provider to clarify EDA grant criteria.
- 2.5. The Provider will attract and retain business start-ups, Tier 2 companies and entrepreneurs to both the Business Incubator and Accelerator as referenced in each Master Lease; Provider will provide services such as, business consulting, mentoring and coaching including but not limited to strategic planning, marketing, distribution, logistics, operation and financial analysis to those in the Business Incubator and the Accelerator.
- 2.6. Provider will exercise good faith efforts to promote the Business Incubator and Accelerator, both within and outside the northern Arizona region and State of Arizona. Provider may consult with the City to develop mutually agreeable plans for implementation.
- 2.7. Provider will create a desirable and optimum transition of clients from the Business Incubator to the Business Accelerator and ultimately to a local commercial facility when Provider determines that such transition is appropriate. Graduates of the Incubator have first option to move into the Accelerator.
- 2.8. Provider will exercise good faith efforts to maintain the confidentiality of any Provider and/or Business Incubator and Accelerator client proprietary information gained in the process in updates, reviews, etc., subject to any disclosure requirements imposed upon the City by law.
- 2.9. The Provider will appoint an Advisory Board. The Advisory Board will be expected to:
- 2.9.1. Meet monthly, review performance of the Business Incubator and Accelerator and report back to the City Council at least annually or on an as needed basis;
 - 2.9.2. Provide public outreach and recruitment to regional communities for the Business Incubator and Accelerator, create awareness for the incubator and accelerator, invite guests to tour, and create remote speaking engagements regarding the Business Incubator and Accelerator;
 - 2.9.3. Provide ongoing recommendations of clients to be reviewed for admittance into the program under the Provider's review and admission process.

- 2.9.4. Give information regarding each sublease to the City to allow the City to review and approve all sublease agreements.
- 2.10. Work with outside funding agencies and groups to locate capital and venture capital for start up businesses.
- 2.11. Recruit new Business Incubator and Accelerator clients from the science and technology sectors.
- 2.12. Lease and operate, upon mutual agreement, the Incubator Building and Accelerator Building.
- 2.13. Seek long-term partnerships and the accompanying financial commitments from government and private sector partners.
- 2.14. Provider will demonstrate that within three (3) years of the receipt of the Certificate of Occupancy for the Business Accelerator, 300 jobs should be created and \$20 million in private investment per U.S. Department of Commerce, Economic Development Administration (EDA) grant requirements, and adhere to any other EDA award conditions.
- 2.15. Provider will comply with all applicable laws, ordinances, rules, regulations and executive orders of the federal, state and local government, which may affect the performance of this Agreement. Any provision required by law, ordinances, rules, regulations, or executive orders to be inserted in this Agreement shall be deemed inserted, whether or not such provisions appear in this Agreement.
- 2.16. Provider will submit to City a written report of the following on a quarterly basis: the number of direct project jobs, the number of jobs created, the number of jobs retained, and the private investment generated as a result of the EDA investment, in a manner that conforms with the requirements of the Government Performance and Results Act Data Collection Form.
- 2.17. Sponsorships (after grant period) - Provider is eligible to conduct fundraising efforts for building improvements, amenities, supplies or any purpose as deemed suitable by the City of Flagstaff.

3. RIGHTS AND OBLIGATIONS OF CITY

- 3.1. City will exercise good faith efforts to promote the Business Incubator and Accelerator, both within and outside the northern Arizona region and State of Arizona. City may consult with the Provider to develop mutually agreeable plans for implementation of this **Section 3.1**.
- 3.2. The City will review subleases and shall have the sole discretion to approve or disapprove of each sublease with written justification. Such approval shall not be unreasonably withheld.

- 3.3. City will exercise good faith efforts to maintain the confidentiality of Provider and/or Business Incubator and Accelerator client proprietary information gained in the process in updates, reviews, etc., subject to any disclosure requirements imposed upon the City by law.
- 3.4. The City will reimburse Provider within thirty (30) days of receipt of invoices and required documentation, unless the City disputes any amount thereof, in which case, the City shall tender any undisputed amounts to Provider and work diligently with Provider to resolve the dispute, resorting to mediation in accordance with **Section 7.10**, if necessary.
- 3.5. The City will meet monthly with Provider's President and CEO.
- 3.6. The City will provide the information submitted to the City pursuant to Section 2.16 to EDA in the Government Performance and Results Act Data Collection Form.

4. NOTICE PROVISIONS

- 4.1. Notice. Any notice concerning this Agreement must be in writing and sent by certified or registered mail, return receipt requested, as follows:

To the City's Authorized
Representative:

Economic Vitality Director
City of Flagstaff
211 West Aspen Avenue
Flagstaff, Arizona 86001
(928)213-2905

To the Provider:

President/CEO
Northern Arizona Center for
Entrepreneurship and Technology
2225 North Gemini Drive
Flagstaff, Arizona 86001

5. INDEMNIFICATION AND INSURANCE

- 5.1. Indemnification. Provider agrees to indemnify, defend and hold harmless the City for, from and against any and all penalties, costs, expenses (including attorneys' fees), claims, demands and causes of action arising out of or in connection with any accident or other occurrence in or on the common areas (including without limiting the generality of the term "common areas," including but limited to, parking areas, stairways, passageways, hallways, conference/meeting rooms, breakout rooms, kitchen areas, area utilized by the EOC, sidewalks or driveways), the use of which Provider may have in conjunction with other tenants and occupants of the Premises, when such injury or damage shall be caused in part or in whole by the act, neglect, fault or omission of any duty with respect to the same by Provider, its agents, servants, employees, invitees, visitors, permittees, customers, clients, guests or tenants.
- 5.2. Insurance. Provider shall procure and maintain, for the duration of the Lease, insurance against claims for injury to persons or damage to property, which may

arise from or in connection with this Lease by Provider, Provider's agents, representatives, employees or contractors, and commercial property insurance. The insurance requirements herein are minimum requirements for this Lease and in no way limit the indemnity covenants contained herein. Landlord does not represent or warrant that the minimum limits set forth herein are sufficient to protect Provider from liabilities that might arise out of this Lease, and Provider is free to purchase such additional insurance as Provider may determine is necessary.

5.2.1. Minimum Scope and Limits of Insurance. Provider shall provide coverage at least as broad and with limits not less than those stated below.

5.2.1.1. Commercial General Liability - Occurrence Form

(Form CG 0001, ed. 10/93 or any replacement thereof)

General Aggregate -- \$2,000,000

Personal and Advertising Injury -- \$1,000,000

Each Occurrence -- \$1,000,000

Fire Damage (any one fire) -- \$50,000

Medical Expense (any one person) -- Optional

5.2.1.2. Workers' Compensation and Employer's Liability

Workers' Compensation -- Statutory

Employer's Liability: Each Accident -- \$500,000

Disease - Each Employee -- \$500,000

Disease - Policy Limit -- \$500,000

5.2.1.3. Professional Liability

Each Claim -- \$1,000,000.00

Annual Aggregate -- \$1,000,000.00

5.2.2. Self-Insured Retention/Deductibles. Any self-insured retentions and deductibles must be declared to and approved by Landlord.

5.2.3. Other Insurance Requirements. The policies shall contain, or be endorsed to contain, the following provisions:

5.2.3.1. Commercial General Liability and Automobile Liability Coverages.

5.2.3.1.1. Landlord, its officers, officials, agents, employees and volunteers shall be named as additional insureds with respect to liability arising out of the use and/or occupancy of the Premises subject to this Lease and activities performed by or on behalf of Provider, including products and completed operations of

Provider; and automobiles owned, leased, hired or borrowed by Provider.

5.2.3.1.2. Provider's insurance shall contain broad form contractual liability coverage.

5.2.3.1.3. Landlord, its officers, officials, agents, employees and volunteers shall be named as additional insureds to the full limits of liability purchased by Provider even if those limits of liability are in excess of those required by this Lease.

5.2.3.1.4. Provider's insurance coverage shall be primary insurance with respect to Landlord, its officers, officials, agents, employees and volunteers. Any insurance or self-insurance maintained by Landlord, its officers, officials, agents, employees or volunteers, shall be in excess to the coverage of Provider's insurance and shall not contribute to it.

5.2.3.1.5. Provider's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5.2.3.1.6. Coverage provided by Provider shall not be limited to the liability assumed under the indemnification provisions of this Lease.

5.2.3.1.7. The policies shall contain a waiver of subrogation against Landlord, its officers, officials, agents, employees and volunteers for losses arising from Provider's operations, occupancy and use of the Premises subject to this Lease.

5.2.3.2. Workers' Compensation and Employee's Liability Coverage. The insurer agrees to waive all rights of subrogation against Landlord, its officials, officers, agents, employees and volunteers for losses arising from Provider's operations, occupancy and use of the Premises subject to this Lease.

5.2.4. Notice of Cancellation. Each insurance policy required by the insurance provisions of this Lease shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to Landlord.

- 5.2.5. Acceptability of Insurers. Provider shall place insurance hereunder with insurers duly licensed or approved unlicensed companies in the State of Arizona and with a "Best's" rating of not less than A-: VII. Landlord does not represent or warrant that the above required minimum insurer rating is sufficient to provide Lessee from potential insurer insolvency.
- 5.2.6. Verification of Coverage. Provider shall furnish Landlord with certificates of insurance (*ACORD form*) as required by this Lease. The certificates for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. Any policy endorsements that restrict or limit coverage shall be clearly noted on the certificate of insurance.
- 5.2.7. Policy Review and Adjustment. Such policies of insurance shall be subject to review and adjustment on the fifth (5th) anniversary of the Commencement Date of this Lease and on each subsequent fifth (5th) anniversary during the Term hereof, as may be extended, in order to determine the adequacy of the insurance amounts in light of the then existing circumstances.
- 5.2.8. Failure to Maintain Insurance. If Provider fails or refuses to provide copies of the renewal insurance policies, together with evidence of payment of premiums therefor, or otherwise fails or refuses to procure or maintain insurance as required by this Lease, Landlord shall have the right, at Landlord's election, and upon five (5) days' notice to Lessee, to procure and maintain such insurance. Any premiums paid by Landlord hereunder shall be due and payable by Provider to Landlord on the first day of the month following the date on which the premiums were paid. Landlord shall give prompt notice of the payment of such premiums, stating the amounts paid and the name(s) of the insured(s).
- 5.3. Liability Insurance. Provider agrees to procure and maintain at its own cost and expense, during the entire term of this Agreement and any extensions thereof, comprehensive public liability insurance covering the Premises, which insurance shall also name Master Lessor as additional named insureds. The liability coverage under such insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury, illness or death to persons or damage to property in any one incident. Prior to, and as a condition of, taking possession of the Premises, Provider will provide Master Lessor with certificates of such insurance and endorsements, satisfactory to Master Lessor, evidencing Provider's compliance with the requirements of this **Section 5.3**.
- 5.4. Personal Property. Provider hereby acknowledges that Provider's insurance will not cover any Sublessee's specialized equipment or any other fixtures, furniture or personal property owned by Sublessee. Neither Master Lessor nor Sublessor shall be liable to Sublessee, or to any other person, for any damages on account of loss, damage, fire or theft to any personal or business property, and Sublessee shall be

solely responsible for obtaining and maintaining any property loss insurance in connection therewith.

6. DEFAULT AND TERMINATION

6.1. Events of Provider Default Defined. The following will be Events of Provider Default under this Agreement:

6.1.1. Any material misrepresentation made by Provider to the City;

6.1.2. Any failure by Provider to perform its obligations under this Agreement including, but not limited to, the following:

6.1.2.1. Failure to perform the work in a manner reasonably satisfactory to the City;

6.1.2.2. Discontinuance of the work for reasons not beyond Provider's reasonable control;

6.1.2.3. Failure to comply with a material term of this Agreement, including, but not limited to, the provision of insurance; and

6.1.2.4. Any other acts specifically stated in this Agreement as constituting a default or a breach of this Agreement.

6.2. Events of City Default Defined. The following will be Events of City Default under this Agreement:

6.2.1. Any material misrepresentation made by the City to Provider;

6.2.2. Any failure by the City to perform its obligations under this Agreement including, but not limited to, the following:

6.2.2.1. Failure to comply with a material term of this Agreement; and

6.2.2.2. Any other acts specifically stated in this Agreement as constituting a default or a breach of this Agreement.

6.3. Remedies.

6.3.1. Subject to the dispute resolution provision under **Section 7.10**, upon the occurrence of any Event of Default of a party, the non-defaulting party may declare the defaulting party in default under this Agreement by providing written notice thereof and specifying the nature of the default. The defaulting party will have forty-five (45) days to cure the default, unless the nature of the default is such that it cannot be cured within such time period with reasonable diligence, and the defaulting party commences to cure the default within the forty-five (45) day time period and continues diligently to take all

reasonable steps necessary to cure the default. If the defaulting party fails to cure the default as set forth herein, the non-defaulting party, upon written notice to the defaulting party, may invoke any or all of the following remedies:

6.3.1.1. The right to cancel this Agreement;

6.3.1.2. The right of specific performance, an injunction or any other appropriate equitable remedy;

6.3.1.3. The right to monetary damages;

6.3.1.4. The right to withhold all or any part of funds payable under this Agreement;

6.3.1.5. The right to seek recoupment of public funds spent for impermissible purposes.

7. GENERAL PROVISIONS

7.1. Headings. The article and section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision of this Agreement.

7.2. Jurisdiction and Venue. This Agreement shall be administered and interpreted under the laws of the State of Arizona. The Provider hereby submits itself to the original jurisdiction of those courts located within Coconino County, Arizona.

7.3. Severability. If any part of this Agreement is determined by a court to be in conflict with any statute or constitution or to be unlawful for any reason, the parties intend that the remaining provisions of this Agreement shall remain in full force and effect unless the stricken provision leaves the remaining Agreement unenforceable.

7.4. Assignment. This Agreement is binding on the successors and assigns of the parties hereto. The Agreement may not be assigned by either the City or Provider without prior written consent of the other.

7.5. Conflict of Interest. The Provider covenants that it presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of services required to be performed under this Agreement. The Provider further covenants that in the performance of this Agreement it will not engage any employee or apprentice having any such interest. The parties agree that this Agreement may be cancelled for conflict of interest in accordance with Arizona Revised Statutes § 38-511.

7.6. Authority to Contract. Each party represents and warrants that it has full power and authority to enter into this Agreement and perform its obligations hereunder, and

that it has taken all required acts or actions necessary to authorize entering into this Agreement.

- 7.7. No Waiver. Except as otherwise expressly provided in this Agreement, any failure or delay by either party in asserting any of its rights or remedies as to any default will not operate as a waiver of any default, or of any such rights or remedies, or deprive any such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.
- 7.8. Integration. This Agreement represents the entire understanding of City and Provider as to those matters contained in the Agreement, and no prior oral or written understanding shall be of any force or effect with respect to those matters. This Agreement may not be modified or altered except in writing signed by duly authorized representatives of the parties.
- 7.9. Nonappropriation. In the event that no funds or insufficient funds are appropriated and budgeted in any fiscal period of the City for payments to be made under this Agreement, the City will notify Provider of such occurrence, and this Agreement will terminate on the earlier of the last day of the fiscal period for which sufficient appropriation was made or whenever the funds appropriated for payment under this Agreement are exhausted. No payments shall be made or become due to Provider under this Agreement beyond these amounts appropriated and budgeted by the City to fund payments under this Agreement.
- 7.10. Dispute Resolution.
- 7.10.1. Mediation. If a dispute arises out of or relates to this Agreement, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to resolve the dispute by mediation before resorting to litigation or some other dispute resolution procedure. Mediation will be self-administered and conducted under the CPR Mediation Procedures established by the CPR Institute for Dispute Resolution, 366 Madison Avenue, New York, New York 10017, (212) 949-6490, www.cpradr.org, with the exception of the mediator selection provisions, unless other procedures are agreed upon by the parties. Unless the parties agree otherwise, the mediator(s) shall be selected from panels of mediators trained under the Alternative Dispute Resolution Program of the Coconino County Superior Court. Each party agrees to bear its own costs in mediation. The parties will not be obligated to mediate if an indispensable party is unwilling to join the mediation. This section does not constitute a waiver of the parties' right to arbitrate or initiate legal action if a dispute is not resolved through good faith negotiation or mediation, or if provisional relief is required under the Arizona Rules of Civil Procedure.

7.10.2. Litigation and Attorneys' Fees. Except as otherwise agreed by the parties, any litigation brought by either party against the other to enforce the provisions of this agreement must be filed in the Coconino County Superior Court. In the event any action at law or in equity is instituted between the parties in connection with this agreement, the prevailing party in the action will be entitled to its costs including reasonable attorneys' fees and court costs from the non-prevailing party.

7.11. Relationship of Parties. Provider shall perform all work and services as described herein as an independent contractor. No person performing any of the work or services described herein shall be considered an officer, agent, servant or employee of the City. Provider shall be solely responsible for the acts or omissions of its officers, agents, employees and subcontractors. Nothing herein shall be construed as creating a partnership or joint venture between City and Provider.

8. DURATION OF THE AGREEMENT

This Agreement shall be effective on and from the day and year executed by the parties, indicated below, and shall continue in force as provided in **Section 1**, unless sooner terminated as provided above.

City of Flagstaff

**Northern Arizona Technology & Business
Incubator, Inc., dba NACET (Provider)**

Gerald Nabours, Mayor

Annette Zinky, President and CEO

Attest:

City Clerk

Approved as to form:

City Attorney

Date of Execution: _____

